Nos. 80-1538 and 80-1934

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER AND STATE OF TEXAS, *et al.*,
Appellants,

v.

J. AND R. DOE, as guardian ad litem for I. DOE, *et al.*,
Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
Appellants,

v.

UNITED STATES OF AMERICA,
Intervenor-Appellee,

and

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN,
Appellees.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

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BRIEF *AMICI CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, SUPPORTING APPELLEES

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BRIEF AMICI CURIAE OF THE
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CITIZENS, SUPPORTING APPELLEES

INTERESTS OF THE AMICI

The National Education Association and the League of United Latin American Citizens file this brief as amici curiae supporting affirmance of the decisions below. Letters by all parties consenting to the filing of this brief have been filed with the Court.

The National Education Association is a non-profit corporation founded in 1857 and chartered by an Act of Congress in

1906. It is an independent, voluntary organization of some 1.7 million educators, including professional teachers, supervisors, and administrators. One of its principal purposes is to promote the education of all children in the United States. The Association has long been committed to the principle that access to basic education is essential to the interests of society and its individual members.

The League of United Latin American Citizens was founded in Texas in 1929 to promote the political, social, and economic rights of Hispanic people in the United States. The League has been extensively involved in the promotion of educational opportunities for Hispanics in Texas and the Southwest, and has been especially

active in the litigation of Hispanic desegregation cases and the development of bilingual educational programs for Hispanics. The League views the Texas statute involved in these cases as part of a long history of educational discrimination against Hispanics in Texas.

INTRODUCTION AND SUMMARY OF ARGUMENT

Prior to 1975, Section 21.031 of the Texas Education Code, V.T.C.A. Education Code § 21.031 (1976 Supp.) gave the right to tuition-free basic education to all children actually residing within a local Texas school district. Section 21.031 was amended in 1975 to limit tuition-free education to "citizens of the United States or legally admitted aliens."

At least some local Texas school districts, under color of Section 21.031, have chosen to exclude all undocumented alien children from access to the public schools. Moreover, in those school districts in which undocumented alien children have been charged tuition, the district courts below found that indigent undocumented alien children could not afford the required tuition payments and were hence effectively excluded from Texas public schools. Thus, Section 21.031 effects an absolute denial of basic education to undocumented alien children residing in the State of Texas, while providing free public education to all others.

Amici contend that any state law which totally deprives resident children of access to basic education so fundamentally

damages the children's opportunity to function in society that it must be subjected to strict scrutiny under the equal protection clause. The history of the Fourteenth Amendment confirms that access to education was one of the most basic rights of freedmen which the equal protection clause was designed to protect. The debates in Congress during the adoption of the Fourteenth Amendment reflect a consensus that educational opportunity was essential to the full exercise of constitutional and other rights by former slaves and that access to basic education was a fundamental right protected by the equal protection clause. This consensus was confirmed less than four years after enactment of the Fourteenth Amendment, when Congress conditioned the readmission to

representation in Congress of several states, including Texas, on the express promise that their state constitutions never be amended to deny equal access to the common-schools and school privileges established by their existing constitutions. The constitutionality of these Congressional readmission statutes was expressly predicated on the view that under the Fourteenth Amendment access to basic education was a fundamental element of a republican form of government.

Amici also contend that the present cases reflect precisely the form of discrimination which the Fourteenth Amendment was designed to eliminate -- discrimination which results in the perpetuation of a permanent subclass of

benighted individuals within the borders of a state neglectful of their interests. The long history of discrimination against Hispanics in Texas closely parallels the history of discrimination against slaves and post-Civil War freedmen which motivated Congress to amend the Constitution. Although the legal status of undocumented alien children is different in some respects from that of post-Civil War freedmen, the debates on the Fourteenth Amendment reflect Congress' recognition that the fundamental importance of educational opportunity did not arise solely from the legal and political status of those being discriminated against.

Because Texas has not advanced a compelling state interest in excluding undocumented alien children from its public

schools, Section 21.031 cannot withstand the strict scrutiny which the equal protection clause requires. The statute should therefore be declared constitutionally invalid.

ARGUMENT

I. ACCESS TO BASIC EDUCATION IS ONE OF THE FUNDAMENTAL INTERESTS PROTECTED BY THE EQUAL PROTECTION CLAUSE.

In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 25 n.60, 36 (1973), this Court suggested, without deciding the point, that strict judicial scrutiny might be warranted where a state which otherwise provided free public education totally excluded some of its residents from its public schools.

The issue left open in Rodriguez is presented by these cases. 1/

As the Court in Rodriguez recognized, the absolute denial of basic education may unconstitutionally impede the meaningful exercise of the First Amendment freedom to impart and receive information and the effective utilization of the right to vote. Id. at 35-36. The relationship between education and the proper functioning of a republican form of government is one which was frequently expressed by the original framers of the Constitution. The existence of the relationship was made explicit

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1/ The Supreme Court has not addressed this issue since Rodriguez, although in a case involving the right to teach in public schools, the Court, citing Rodriguez, stated that a fundamental interest was not at stake. Ambach v. Norwick, 441 U.S. 68, 77, n.7 (1979).

eighty years later in the debates of the 39th Congress involving the Fourteenth Amendment and two related statutes, the extension of the Freedmen's Bureau and the Civil Rights Act of 1866. These debates reveal Congress' understanding that freedmen could not truly achieve equal status unless they were provided with meaningful educational opportunities. Congress implemented this understanding by making access to basic education one of the fundamental guarantees of the equal protection clause.

At the time the federal Constitution was originally adopted, the tradition of universal public education provided at government expense had only begun to take hold in this country. The Constitution itself does not make explicit reference to

education, and only seven of the original thirteen states included provisions in their first state constitutions for the education of state residents. Knight & Hall, Readings in American Educational History (1951) at 113. However, the fact that the framers of the Constitution had not yet settled on the means of providing education does not suggest that they were in disagreement as to the crucial role of education in preserving the nascent republican government which they had created. To the contrary, as stated by the historian Page Smith, "[t]hose Founding Fathers who discussed education (and most of them did) were agreed on one basic tenet: a republican form of government could not

survive without an educated citizenry." 2/

This basic tenet was expressed by George Washington in his Farewell Address:

> Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of government gives force to public opinion, it is essential that public opinion should be enlightened. 3/

John Adams also believed that education was essential to a republican form of government:

> Education is more indispensable, and must be more general, under a free government than any other. In a monarchy, the few who are likely to govern must have some education, but the common people must be kept in ignorance; in an aristocracy, the nobles should be

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2/ Smith, The Shaping of America, Vol. III (1980), at 353.

3/ Farewell Address (Sept. 17, 1796) reprinted in 13 The Writings of George Washington 309 (P. Ford ed. 1892).

> educated, but here it is even more necessary that the common people should be ignorant; but in a free government knowledge must be general, and ought to be universal. 4/

It is in the writings of Thomas Jefferson, an ardent proponent of public education, that the most thorough exposition of the relation between education and government may be found. Specifically, Jefferson viewed education as a necessary corollary of the right to an equal vote and of the right freely to transmit and receive information:

> If a nation expects to be ignorant and free in a state of civilization it expects what never was and never will be. The functions of every government have propensities to command at will the liberty and property of their constituents. There is no safe deposit for these but with the people themselves; nor

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4/ 6 The Life and Works of John Adams 198 (Charles Francis Adams ed. 1851).

can they be safe with them without information. 5/

Jefferson also believed that the population must be educated in order for a free press to fulfill its role under the Constitution. "When the press is free," Jefferson wrote, "and every man able to read, all is safe." 6/ James Madison expressed these same views: "A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or, perhaps both." 7/

Thus, the framers of the original Constitution believed that education was as

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5/ Letter from Thomas Jefferson to Col. Yancey (January. 6, 1816) reprinted in 6 The Writings of Thomas Jefferson 517 (H. Washington ed. 1857).

6/ Perkinson, Two Hundred Years of American Educational Thought 44 (1976).

7/ 9 The Writings of James Madison 104 (G. Hunt ed. 1910).

much a necessity for the kind of government and society they envisioned as it was a private good to those who received its benefits. The maintenance of a division of powers within a unified government and the guarantee of personal liberty within a democracy was believed to hinge, at least in part, on the existence of an educated populace.

A. The History of the Fourteenth Amendment Reveals that Basic Education Was One of the Fundamental Interests of Freedmen Which the Equal Protection Clause Was Designed To Protect.

The first session of the 39th Congress convened on December 4, 1865, six months after the close of the Civil War. During this first session, which lasted through July 28, 1866, the 39th Congress debated

three measures which dealt directly with Reconstruction policy and the emergence of former slaves into freedom: the extension of the Freedmen's Bureau (S.60, 39th Cong., 1st Sess., Cong. Globe at 943), 8/ debated from January 12 through February 20, 1866; the Civil Rights Act of 1866 (Act of April 9, 1866, c.31, 14 Stat. 27), debated from January 29 through April 9, 1866; and the Fourteenth Amendment itself, debated from May 8 through June 13, 1866. These enactments must be considered together, not only because of their chronological proximity but also because Congress itself considered each to be related to the others. See Bickel, The Original

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8/ Unless otherwise stated, all references to the Congressional Globe in this section refer to the 39th Congress, 1st Session.

Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 7-8 (1955).

By the time of the Civil War all of the Northern states and many Southern states had constitutional and legislative provisions providing a common-school education for all children at public expense. See Cubberly, Public Education in the United States (1934) at 163. However, the education of blacks in the Southern states was still virtually non-existent. See Brown v. Board of Education, 347 U.S. 483, 489-90 (1954). In fact, prior to the Civil War most Southern states had enacted legislation prohibiting the education of all blacks, both free and slave. 9/

9/ For a contemporary review of these laws, see Cong. Globe, 36th Cong., 1st Sess., at 1685 (April 12, 1860) (remarks of Senator Wilson).

Approximately ninety-five percent of all blacks in the South at that time were illiterate. Bond, The Education of the Negro in the American Social Order (1934) at 21.

Between the adjournment of the 38th Congress in March 1865 and the opening of the 39th Congress, several Southern states, acting through provisional governments set up by President Johnson, enacted "Black Codes" designed to restrict the freedoms of former slaves. These Black Codes were perceived by Congress as continuing the South's historic practice of forbidding the education of blacks. See, e.g., Cong. Globe at 589-90.

The history of the first session of the 39th Congress, which led to the passage of the Fourteenth Amendment, demonstrates that one of the overriding concerns of the

framers of that amendment was access to educational opportunity by freedmen, which had been denied by the Black Codes of several Southern states. Professor Alexander Bickel has described this concern as follows,

> [T]he first approach made by the 39th Congress toward dealing with racial discrimination turned on the "civil rights" formula. The Senate Moderates . . ., who sponsored this formula, assigned a limited and well-defined meaning to it. In their view it covered the right to contract, sue, give evidence in court, and inherit, hold, and dispose of real and personal property; also a right to equal protection in the literal sense of benefiting equally from laws for the security of person and property . . . . Similarly, the Moderates often argued that one of the imperative needs of the time was to educate, to "elevate," to "Christianize" the Negro; indeed, this was almost universally-held doctrine, from which even Conservatives . . . and Democrats . . . did not dissent. Hence one may surmise that the

> Moderates believed they were guaranteeing a right to equal benefits from state educational systems supported by general tax funds. (emphasis added).

Bickel, supra, at 56. 10/ This guarantee of "equal benefits from state educational systems" was thus intended to be a significant part of the more general guarantee of the equal protection clause.

As soon as the 39th Congress was convened, Senator Wilson of Massachusetts

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10/ Professor Bickel's view that the framers of the Fourteenth Amendment believed they were guaranteeing equal access to state educational systems is fully consonant with his opinion, expressed in the same article, that "there is no evidence whatever showing that for its sponsors the civil rights formula had anything to do with unsegregated public schools. . ." (emphasis added). Id.

introduced a bill designed to nullify the provisions of the Black Codes. As stated by Senator Wilson, his bill was necessary so that the Negro freedman

> can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; . . . (emphasis added).

Cong. Globe at 111. Although the bill ultimately was withdrawn, in its place the Senate began immediate consideration of a bill to extend the Freedmen's Bureau and of the Civil Rights Bill.

The purpose of the extension of the Freedmen's Bureau was to restrain any attempt by the Southern states to enforce the Black Codes. Prior to consideration of

this bill, the Senate had requested and received a report from the President on the status of the Southern states, including the status of education for the freedman. Cong. Globe at 30, 78-80. This report discussed the opposition of Southern whites to black education and recommended that education of the Negro be an integral part of the educational system of the states. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) at 2, 25-27.

One of the provisions of the Freedmen's Bureau bill authorized the Bureau to provide suitable buildings for schools. Cong. Globe at 210. In support of this provision, Senator Trumbull of Illinois, after noting that the Bureau was already providing schooling for seventy thousand black children, stated that "our laws are

to be enacted with a view to educate, improve, enlighten, and Christianize the negro." Cong. Globe at 322. This theme was further emphasized by Representative Donnelly of Minnesota:

> The one great error of our country has been that education was not from the very first made a matter of the State, and as essential to the citizen as liberty itself. Education means the intelligent exercise of liberty, and surely without this liberty is a calamity, since it means simply the unlimited right to err. Who can doubt that if a man is to govern himself he should have the means to know what is best for himself, what is injurious to himself, what agencies work against him and what for him? And the avenue to all this is simply education. Suffrage without education is an edged tool in the hands of a child - dangerous to others and destructive to himself.

Cong. Globe at 586.

After passage of the Freedmen's Bureau Act, the Senate turned immediately to

consideration of the Civil Rights Bill (S.61). The debates on this bill are especially relevant to the history and meaning of the Fourteenth Amendment, because Section 1 of the Fourteenth Amendment (which includes the equal protection clause) was designed to place into the Constitution the rights which the Civil Rights Act of 1866 enumerated. See, e.g., Cong. Globe at 2459 (remarks of Representative Stevens); 2467 (remarks of Representative Boyer).

In his opening remarks in support of the Civil Rights Bill, Senator Trumbull made clear that the bill was designed to eliminate the discriminations of the Black Codes. Id. Senator Trumbull, in listing the primary evils of these Black Codes, referred to the provisions of the precursor

Slave Codes which made it "a highly penal offense for any person, white or colored, to teach slaves . . ." Id. Similarly, Representative Raymond of New York, a moderate Republican, stated his support for extending to Negroes the "rights and privileges" of citizens, which he meant to include "all those rights that tend to elevate [the Negro] and educate him for still higher reaches in the process of elevation." Id. at 1266.

Section 1 of the Civil Rights Bill as originally proposed provided that "there shall be no discrimination in civil rights or immunities among the inhabitants of any State...on account of race, color, or previous condition of slavery..." Cong. Globe at 474. That section then enumerated certain rights available to all "inhabitants

of every race and color", including the right to the "full and equal benefit of all laws and proceedings for the security of person and property . . .". Id.

The full and equal benefit of all laws and proceedings included equal access to basic education. Referring to that clause, Representative Delano of Ohio, a moderate Republican, stated on the floor of the House,

> [W]e once had in the State of Ohio a law excluding the black population from any participation in the public schools or in the funds raised for the support of those schools. That law did not, of course, place the black population upon an equal footing with the white, and would, therefore, under the terms of this bill be void . . . .

Cong. Globe at App. 158. Although the bill as finally enacted eliminated the broad provision protecting general "civil rights

or immunities", the clause providing for the full and equal benefit of all laws was retained.

Because many of the supporters of the goals of the Civil Rights Act doubted that Congress could constitutionally enforce civil rights in the states, passage of the Civil Rights Act led immediately to renewed consideration of a proposed constitutional amendment. 11/ On April 30, 1866, the Joint Committee on Reconstruction placed before both Houses of Congress a committee draft of a proposed constitutional amendment. This draft contained the equal protection language as finally enacted.

11/ For example, Representative Bingham of Ohio, one of the most influential members of the 39th Congress and one of the draftsmen of the Fourteenth Amendment, voted against the Civil Rights Act on constitutional grounds, although he was fully supportive of its goals. Cong. Globe at 1290-93.

The subsequent debates on the proposed Fourteenth Amendment focused primarily on issues other than Section 1, which contained the due process and equal protection provisions. See Bickel, supra, at 47-48, 54. To the extent that Section 1 was discussed, it was urged in order to place the protections of the Civil Rights Act into the Constitution, see, e.g., Cong. Globe at 2459, 2465, and to authorize federal action to prevent the injustices of the Black Codes. 12/

12/ For example, Senator Howard of Michigan, who introduced the draft to the Senate, stated that Section 1

> abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.

Cong. Globe at 2766.

Although the debate on Section 1 was limited, two particular statements are worthy of note. Senator Howe of Wisconsin, addressing the contention that the amendment invaded state rights, argued that no state had the right to deny the protection of equal laws. In enumerating instances of unequal laws, Senator Howe referred to "a statute enacted by the Legislature of Florida for the education of her colored people," stating,

> They [the Florida Legislature] make provision for the education of their white children also, and everybody who has any property there is taxed for the education of the white children. Black and white are taxed alike for that purpose; but for the education of colored children a fund is raised only from colored men.

Cong. Globe at App. 219. Describing this Florida statute as touching upon "one of the great interests not only of this

colored population but of the State itself," Senator Howe concluded by asking rhetorically whether there could be any hesitation in putting into the Constitution "a positive inhibition upon exercising this power of local government to sanction such a crime as I have just portrayed." Id. Although several Senators in response questioned the wisdom of requiring integrated schools, not one expressed doubt that the "crime" identified by Senator Howe would be forbidden by the equal protection clause.

On the last day of Senate debate, Senator Henderson of Missouri described recent actions of the South which in his view necessitated passage of the constitutional amendment:

> The South saw its opportunity and promptly collected together all the elements of prejudice and hatred against the Negro for purposes of future party power. They denied him the right to hold real or personal property, excluded him from their courts as a witness, denied him the means of education, and forced upon him unequal burdens. Though nominally free, so far as discriminating legislation could make him so he was yet a slave.

Cong. Globe at 3034. The Fourteenth Amendment passed the Senate on June 8, 1866 by a vote of 33 to 11, having already passed the House on May 10, 1866 by a vote of 128 to 37.

B. Congressional Actions Immediately Following Adoption of the Fourteenth Amendment Confirm that Access to Basic Education Was a Fundamental Interest Protected by the Equal Protection Clause.

The Reconstruction Act of March 2, 1867 (14 Stat. 428) required all Confederate states (except Tennessee) to reapply

for readmission and representation in Congress after fulfillment of certain conditions. One of these conditions was that the people of these states adopt state constitutions that would be "in conformity with the Constitution of the United States in all respects . . ." Id., § 5. The action and debates of Congress in 1870 during consideration of the application for readmission of Virginia, Mississippi, and Texas provide strong corroboration of the conclusion that access to basic education was one of the fundamental interests protected by the equal protection clause.

The bill to readmit Texas to representation in Congress (Act of Mar. 30, 1870, c. 39, 16 Stat. 80, 81) contained a provision prohibiting Texas from amending its constitution's school provisions. At

the time this bill was enacted, Article IX of the Texas Constitution stated in relevant part,

> Section 1. It shall be the duty of the legislature of this State to make suitable provision for the support and maintenance of a system of public free schools, for the gratuitous instruction of all the inhabitants of this State between the ages of six and eighteen years.
>
> * * *
>
> Section 4. The legislature shall establish a uniform system of public free schools throughout the State.
>
> Section 5. The legislature . . . shall pass such laws as will require the attendance on [sic] the public free schools of the State of all the scholastic population thereof. . .

The debates in Congress on the clause forbidding Texas to amend its constitution's school provisions were quite limited. The purpose of the clause, however, was

made very clear in the earlier debates concerning identical provisions in the acts of Congress readmitting Virginia and Mississippi.

The bill to re-admit the State of Virginia was reported to the House by the Committee on Reconstruction on January 11, 1870. H.R. 783, Cong. Globe, 41st Cong., 2d Sess. at 362. 13/ As part of this bill, Congress declared Virginia entitled to representation in Congress upon certain "fundamental conditions," including the following proviso:

> That the constitution of said State shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to

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13/ Unless otherwise stated, all references to the Congressional Globe in this section refer to the 41st Congress, 2d Session.

> vote or hold office in said state who are entitled to vote or hold office by said constitution. . .,or to prevent any person on account of race, color, or previous condition of servitude from serving as a juror or participating equally in the school fund or school privileges provided for in said constitution . . . (emphasis added).

Id.

The purpose of the provision forbidding any amendment of the state constitution in regard to equal access to schools was explained by Representative Paine. Although the Virginia constitution provided funding for a common-school system accessible to blacks as well as whites, it was widely believed that Governor Walker of Virginia would attempt to eliminate these provisions as soon as Virginia was readmitted to Congress. Cong. Globe at 402-03.

Representative Ward supported the school, jury, and suffrage conditions as "simple, just, patriotic" and as necessary to a republican form of government. Id. at 485. Representative Farnsworth agreed, stating that "so long as you secure the jury-box, the ballot-box, and school privileges to the colored people of Virginia, . . . so long you will have there a republican form of government . . ." Id. This theme was amplified by Representative Scofield and expressly linked to the provisions of the Fourteenth Amendment:

> [T]his new constitution of Virginia has very wisely provided for equal franchise and equal education in that Commonwealth . . . we admit the state with the qualification that it shall not go back upon those just provisions of its constitution after its admission.

* * *

> Then the next question is [sic] reconstruction with us was to educate these blacks so that they could not be restored to slavery; to destroy all hope of the restoration of slavery, and therefore all hope of a separate government. We began first with the civil rights bill, then with the Freedmen's Bureau bill, and then with the fourteenth article of amendment, and now with the fifteenth article of amendment to the Constitution.

Id. at 500; see also id. at 717 (remarks of Representative Butler). The bill as initially passed in the House did not contain any of the above conditions, id. at 502-03, but the Senate restored the conditions 14/, id. at 643, and the House concurred in

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14/ As adopted by the Senate, the condition regarding schools read as follows:

> that the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State.

Id. at 643.

the Senate amendments restoring these conditions. Id. at 717; see Act of Jan. 26, 1870, c. 10, 16 Stat. 62, 63.

On February 3, 1870, the House received a bill to admit Mississippi to representation in Congress. This bill contained a proviso identical to that contained in the earlier Virginia bill, preventing the state from amending its constitution to deny equal suffrage, jury participation, and equal access to state common schools. The bill passed the House immediately, Cong. Globe at 1014, but was debated at length in the Senate.

Senator Howard of Michigan justified each of the "fundamental conditions," id. at 1218, contained in the House bill by the Constitutional clause guaranteeing a

republican form of government to all states. Senator Thurman of Ohio, in a lengthy speech attacking the constitutionality of these fundamental conditions, rhetorically asked,

> When did it become essential to a republican form of government that there should be public schools and that everybody should have an equal right in those schools?

Id. at 1218. If a universal education provision was part of the guaranty clause, Senator Thurman asked, "how many republican States were there when the Constitution of the United States was formed?" Id.

Three days later, on February 14, 1870, both Senator Howard and Senator Morton of Indiana responded to Senator Thurman's constitutional arguments. In

regard to the provision relating to schools, Senator Howard stated,

> Now, sir, if there be any one proposition more generally admitted than another among American citizens, politicians, and statesmen, it is that in order to uphold and maintain a republican form of government such as is understood and practiced on this continent, the diffusion of knowledge by means of primary schools is the greatest, the safest, and the most effectual instrument.

Id. at 1253. More specifically, Senator Morton challenged Senator Thurman's views on the ground that the definition of a republican form of government was not a static concept fixed in time:

> I controvert the position that this clause means the same thing now in the Constitution that it did in 1787, because every amendment that is put into that instrument which is in conflict with an existing clause modifies and changes the meaning of that existing clause.

* * *

> I reply to the argument of the Senator from Ohio, that the definition of a republican form of Government once consistent with the slavery of one half or two thirds of the people; once consistent with the denial of civil rights to one half of the people; once consistent with the denial of education and of protection to a majority of the people, has been changed by the repeated amendments of the Constitution, and such a Government would now be utterly inconsistent with a republican form of government as defined by the Constitution of the United States. (emphasis added).

Id. at 1254-55. The bill was passed by the Senate on February 17, 1870. Id. at 1366, Act of Feb. 23, 1870, c. 19, 16 Stat. 67, 68. Less than two months later, Texas was admitted to representation in Congress upon fulfillment of the same "fundamental conditions." See discussion, supra, at 33.

The debates and votes in Congress on these readmission statutes indicate wide acceptance of the view that the Fourteenth Amendment altered the concept of a republican form of government to include equal access to state schools. The debates also confirm Congress' original view that access to education was a fundamental interest protected by the Fourteenth Amendment.

II. ACCESS TO BASIC EDUCATION IS A FUNDAMENTAL INTEREST OF UNDOCUMENTED ALIEN CHILDREN RESIDING IN TEXAS.

As demonstrated above, the Fourteenth Amendment in general and the equal protection clause in particular were promulgated with the express purpose of eradicating

invidious discrimination against former slaves which had persisted in the South notwithstanding the abolition of slavery itself. The historical origins of the equal protection clause have special significance in this case not only because they reveal the fundamental importance of the interest at stake, but also because the social and economic circumstances of undocumented aliens in Texas resemble in many ways the condition of those former slaves for whose benefit the Fourteenth Amendment was originally enacted.

Although by its terms Section 21.031 applies to all undocumented alien children in Texas, appellants do not deny that the statute was enacted in response to the presence in Texas of undocumented alien children of Mexican origin, and that its

impact is felt almost exclusively by such children. In fact, one of the district courts below found that "the State generally monitors compliance with [Section 21.031] by examining the immigration status or citizenship of Spanish-surnamed persons . . ." In re Alien Children Education Litigation, 501 F. Supp. 544, 574 (S.D. Tex. 1980).

This Court has previously taken notice of the long history of discrimination in education and other areas against Hispanics in Texas. Casteneda v. Partida, 430 U.S. 482, 487-88, 493 (1977); White v. Regester, 412 U.S. 755, 768 (1973). This history reveals that there are numerous parallels between the historical condition of Hispanics in Texas (particularly of undocumented aliens), and that of the

recently freed slaves at the time of the Civil War. Indeed, the Texas Advisory Committee of the United States Civil Rights Commission has stated in a recent report that "the situation in South Texas for the undocumented person. . . resembles the early slavery in the United States." Texas Advisory Committee, Sin Papeles: The Undocumented in Texas (1980) at 25 [hereinafter "The Undocumented in Texas"]. 15/

Like former slaves, undocumented Hispanics in Texas are a class of persons whose presence in this country is a direct outgrowth of an economic demand for inexpensive labor. Moreover, like the institution of slavery in the South, the

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15/ In re Alien Children Litigation, Plaintiff's Trial Exhibit 12.

exploitation of undocumented aliens in Texas has been sanctioned and even supported by deliberate policies of both the federal and state governments. Dr. Gilbert Cardenas, certified at trial as an expert on Hispanic immigration, 16/ testified that historically the touchstone of federal and state policy in this regard was the temporary importation of Mexican contract laborers. In re Alien Children Litigation, Trial Transcript, Vol. I, at 59. By relying on temporary contract laborers, the United States could "utilize Mexican workers on a temporary basis and then remove them or insure the removal when they were no longer useful to the economy and no

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16/ In re Alien Children Litigation, Trial Transcript, Vol. I, at 54-55.

longer needed by the particular employer." Id. at 60. As stated by the Texas Advisory Committee,

> [T]he Mexican people of this area and their descendants have historically been the providers of cheap labor to the industrial and agricultural interests of the United States. United States immigration policy has tended to reflect the social and economic perspective of the "Mexican" as a cheap labor commodity to be barred in times of recession or imported in great numbers when needed.

The Undocumented in Texas, supra, at 2.

The active role of Texas employers in soliciting undocumented aliens for employment in Texas was elaborated at trial in one of the present cases. Gloria Cabrera, a regional attorney for the United States Commission on Civil Rights, testified that there exists a "black market" in Texas for undocumented alien workers. In re Alien Children Litigation, Trial Transcript,

Vol. XI, at 1196. As part of this black market, employers in the United States contract with individuals to enter Mexico to recruit Mexican laborers for the United States market. Ms. Cabrera testified that Immigration and Naturalization Service personnel referred to this practice as "slavery" and considered the victims of these contract labor arrangements as "slaves of this present period." Id.

The vulnerability of undocumented Hispanics resulting from their legal and political status makes them natural targets of exploitation by their employers. See Comptroller General of the United States Report to the Congress, Illegal Aliens:

Estimating Their Impact on the United States (1980) at 14-22. Approximately one-fourth of undocumented workers in the Southwest in 1975 earned less than the minimum wage. Id. at 20-21. Moreover, the Report points out that "[m]any illegal aliens do not place demands on their employers for fear of being turned in to INS officials and being deported." Id. at 20.

Undocumented Hispanics are exploited not only by their employers but also, in a passive sense at least, by the governments to which they contribute their tax dollars. Several independent studies have shown that over three-quarters of undocumented workers have income tax and social security deducted from their wages, and pay more in federal and state taxes than the value of

the services they receive in return. In re Alien Children Litigation, Trial Transcript, Vol. I (testimony of Dr. Cardenas) at 80-83. Moreover, because Texas relies on a state sales tax instead of an income tax, undocumented workers contribute to state taxes on an equal footing with citizens and documented aliens.

As in the case of slavery prior to the Civil War, the economic subjugation of Hispanics in Texas -- documented or undocumented -- has been accompanied by invidious discrimination whose effect has been to perpetuate a permanent under-class of Texas residents. In Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972), aff'd in relevant part sub. nom. White v. Regester, 412 U.S. 755 (1973), a three judge federal district court found:

> Because of long-standing educational, social legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called de jure and some of a so-called de facto character, the Mexican-American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others. [343 F. Supp. at 728.]

The finding of the court in Graves is confirmed by numerous cases and studies which show that persons of Mexican descent, in Texas and elsewhere in this country have historically been treated unequally in the areas of access to courts, 17/

17/ See Casteneda v. Partida, 430 U.S. 482 (1977); Hernandez v. Texas, 347 U.S. 475 (1954).

representation in state legislatures, 18/ employment, 19/ and housing. 20/

Perhaps the most direct form of discrimination against Hispanics, and certainly the most relevant to the present cases, appears in the history of education of Hispanics in Texas. Separate "Mexican" schools were established in Texas as early as 1902 and by the 1920's tri-ethnic school systems with separate schools for Anglo,

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18/ See White v. Regester, 412 U.S. 755, 767-70 (1973).

19/ See Greenfield and Kates, Mexican Americans, Racial Discrimination and the Civil Rights Act of 1866, 63 Calif. L. Rev. 662, 718-23 (1975).

20/ See Moore and Mittelbach, Residential Segregation in the Urban Southwest, Mexican American Study Project, UCLA Advance Report IV (1966); Mittelbach and Marshall, The Burden of Poverty, Mexican American Study Project, UCLA Advance Report V (1966).

black, and Hispanic children were well-established throughout the state. Project Report: De Jure Segregation of Chicanos in Texas Schools, 7 Harv. C.R.-C.L. Law R. 307, 313-14 (1972). Not until 1948 did state education authorities repudiate segregation of Hispanic students as an expression of official policy. Id. at 312, 336-37.

Notwithstanding this change in official policy, segregation of Hispanics in Texas public school districts continued well after 1948 and well after this Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954). In 1972, the Fifth Circuit in two separate cases held that the public schools of the Austin and Corpus Christi Independent School Districts still unconstitutionally segregated Hispanic from

Anglo school children. United States v. Texas Education Agency, 467 F.2d 848 (5th Cir. 1972) (en banc); Cisneros v. Corpus Christi Independent School District, 467 F.2d 142 (5th Cir. 1972) (en banc), cert. denied, 413 U.S. 922 (1973). In both cases, the Fifth Circuit found that these segregated schools caused Hispanics to suffer a deprivation of educational opportunity. United States v. Texas Education Agency, supra, at 862; Cisneros, supra, at 150. Moreover, statistical surveys confirm that the extent of segregation of Hispanics in Texas and the South in general has increased since 1972. See National Center for Education Statistics, The Condition of Education for Hispanic Americans (1980) at 48, Table 2.05.

The historical parallels between discrimination against blacks in the post-Civil War South and discrimination against Hispanics in Texas are by no means accidental. Both groups were encouraged or brought into this country to satisfy the need for a source of inexpensive labor. Despite their important economic contribution, both groups were segregated from the dominant white society and, because of their political, social and economic vulnerability, were denied basic political, civil, and economic rights, especially in the area of education. In both cases discriminatory treatment perpetuated a permanent subclass of benighted individuals neglected or discriminated against by the state.

There are, to be sure, distinctions between the legal status of undocumented aliens and the legal status of post-Civil War freedmen. It is important to recognize, however, that the framers of the Fourteenth Amendment did not consider the fundamental importance of educational opportunity to arise solely from the legal and political status of those being discriminated against. This point is most vividly demonstrated by the fact that many of the most prominent proponents of the Fourteenth Amendment did not consider that that amendment gave freedmen the right of immediate suffrage. See Bickel, supra, at 58. In their view, it was necessary to establish an interim period in which "to educate, improve, enlighten, and Christianize the negro." See text, supra,

at 23-24. Significantly, Thaddeus Stevens, the prominent Radical Republican from Massachusetts, was convinced to accept this delay in suffrage by the arguments of Robert Dale Owen, an influential reformer who was quite active in the affairs of the Joint Committee. See Bickel, supra, at 42. Owen told Stevens that the Negro was not yet ready to vote or hold office and that suffrage was not now the Negro's immediate need: "[h]e thirsts after education, and will have it if we but give him a chance, and if we don't call him away from the school-room to take a seat which he is unfitted to fill in a legislative chamber." 21/

21/ Owen, Political Results From the Varioloid, 35 Atlantic Monthly 660, 663 (1875).

The perceived need to educate the freedman prior to providing suffrage demonstrates that the right of access to basic education was not viewed merely as a corollary of the right to vote or other legal rights. Education for freedmen was perceived as a means of eliminating the vestiges of slavery and ensuring the dignity and participation of all people in American society.

Moreover, to the extent that the Fourteenth Amendment was designed to prepare former slaves to assume a higher political or legal status in the future, it is obviously contrary to the intent of that amendment to predicate undocumented aliens' equal protection rights solely on their present status. The evidence in these cases demonstrates that many of the

undocumented alien children in Texas will likely become either citizens of the United States or documented aliens. See In re Alien Children Litigation, supra, at 558; Doe v. Plyler, 458 F. Supp. 569, 581, n.14 (E.D. Tex. 1978), aff'd., 628 F.2d 448 (5th Cir. 1980). In addition, the present Administration has submitted to Congress a proposal which, if adopted, would establish a new legal status of "renewable term temporary resident" for undocumented aliens present in the United States prior to January 1, 1980. This proposal would thereby allow the long-term presence in the country of many undocumented aliens presently residing in Texas. See Statement by the President, United States Immigration and Refugee Policy, Weekly Compilation of Presidential Documents 829, 830 (July 30, 1981).

There is no need to elaborate on the overwhelming harm to individuals and to society that will be caused by denying undocumented alien children the means of obtaining a basic education. The record is replete with testimony establishing the psychological, social, and economic deprivation caused by a lack of basic education. See, e.g., In re Alien Children Litigation, supra, at 561-62. As did the framers of the Fourteenth Amendment in considering the need to educate the freedman, this Court must recognize that the inevitable result of denying basic education to any class of persons - regardless of their present legal status - will be the perpetuation of a permanently inferior caste, exposed to exploitation by the rest of society. There can be no doubt that if Section 21.031 is

upheld it will permanently foreclose the future for one small portion of Texas residents.

CONCLUSION

For the foregoing reasons, amici respectfully urge that the decisions below be affirmed.

Respectfully submitted,

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